N. 2913

No. 14539

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

IN THE MATTER OF

THE LOS ANGELES COUNTY PIONEER SOCIETY,

Debtor.

Memorandum of Historical Society of Southern California in Opposition to Motion to Reinstate Stay.

LAWLER, FELIX & HALL,

OSCAR LAWLER,

605 West Olympic Boulevard,
Los Angeles 15, California,

Attorneys for Historical Society of Southern California.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

No. 14539

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

IN THE MATTER OF

THE LOS ANGELES COUNTY PIONEER SOCIETY,

Debtor.

Memorandum of Historical Society of Southern California in Opposition to Motion to Reinstate Stay.

General Statement.

Appellant, Los Angeles County Pioneer Society, a California corporation organized for public charitable purposes,[1] commenced in the Superior Court at Los Angeles proceeding to dissolve and distribute its property among its members. The People of the State, by the Attorney General, filed complaint in intervention, and thereon judgment was rendered that all of Pioneer's property is dedicated to the public charitable trust stated in its articles, and that Pioneer had abused and abandoned the trust, was ousted and required to account as trustee. Historical Society of Southern California was appointed successor

---

[1] *In the Matter of the Estate of Victor Dol, Deceased, Los Angeles County Pioneer Society, Respondent, v. Frank P. Flint, et al., Executors, Appellants* (1921), 186 Cal. 64.

trustee, and $95,243.54 trust funds, theretofore impounded, turned over to it.

The judgment also directed Pioneer, after accounting, to wind up its business, report to the court, and, on approval of the report, to proceed with the contemplated dissolution.

The judgment was affirmed May 5, 1953.[2]

June 29, 1954, Pioneer represented to the Superior Court that it would account as directed, and July 27th at 10 o'clock a.m. was fixed as the time for hearing the account.[3]

No account was filed; but, on July 26, 1954, Pioneer filed in the United States District Court Petition for Arrangement under Chapter XI of the Bankruptcy Act. Therein it withheld mention of its charitable status. It alleges that it is a "non-profit" corporation and is the beneficial owner of the $95,243.54 held by Historical Society of Southern California as trustee. It concurrently obtained *ex parte* orders from District Judge Harrison staying proceedings in the State Court and restraining Historical Society and the latter's bank depositary from making any disposition of the funds.

The stay was served on Superior Judge Pope at about 10 o'clock a.m. July 27, 1954, whereupon counsel for all parties called on Judge Harrison. The latter's attention was called to the decision of the California Supreme Court last above cited, and counsel for the State and Historical

---

[2]*In re Los Angeles County Pioneer Society, a Corporation, in Process of Voluntary Dissolution; L. A. County Pioneer Society et al., Appellants, v. Historical Society of Southern California (a Corporation) et al., Respondents; The People, etc. Interveners and Respondents* (1953), 40 Cal. 2d 852; cert. den. 346 U. S. 888.

[3]Tr. 7-30-54, p. 27, lines 4-8.

Society asked that he vacate the stay and restraining orders.

Judge Harrison was engaged in a trial. He stated that the matter would be considered at his earliest opportunity.

Counsel were later informed that at Judge Harrison's request, Judge Mathes had agreed to hear the matter on July 28, 1954, at 2 p.m.

At that time, all parties being present in open court, the hearing was without objection proceeded with and concluded on July 30, 1954.[4]

July 28, 1954, the stay was vacated, and on July 30, 1954, all other orders were vacated and the petition was dismissed.[5]

Pioneer appeals, and, asserting that the vacation of the orders was without proceedings, without affidavits, without grounds and without specifications and summary, asks that they be reinstated.

Allegations of the Petitions for Arrangement, for Extension of Time to File Schedules, for Stay and for Restraining Orders.

The Petition for Arrangement alleges in substance:

That Pioneer is a "non-profit" corporation, and its purposes as stated in its articles are quoted;[6]

That it acquired real and personal property by testamentary and other gifts and, in 1947, its assets amounted to $95,263.67; and that said assets con-

---

[4]Tr. 7-30-54, p. 5, line 15, to p. 7, line 5.

[5]Tr. 7-28-54, p. 37, line 23; Tr. 7-30-54, pp. 54 and 55.

[6]Pet. p. 1, line 22, *et seq.;* Pet. p. 2, lines 7-26.

sist of "stocks and bonds which the Historical Society has bought as trustee for * * * Pioneer * * * and which will be turned over to the trustee appointed by the court."[7]

That, having obtained declaratory judgment that it could do so, Pioneer resolved, and commenced proceedings, to dissolve and distribute its property among its members; that in the dissolution proceedings, following objection to the proposed distribution, "the funds were ordered impounded and later transferred to another society *as trustees for * * * Pioneer Society's funds*";[8]

That in "these proceedings" Pioneer became obligated for attorneys' and accountants' fees and other expenses; that it has no funds with which to pay these expenses or other debts as they mature, and "arrangement" is, therefore, necessary;[9]

That the resolution to dissolve was revoked January 21, 1953.[10]

The "arrangement" proposed by the petition is that the Bankruptcy Court:

Take possession of the stocks and bonds *which Historical Society has bought as trustee for Pioneer and which are now in possession of Historical*;[11]

---

[7]Pet. p. 2, line 28, to p. 3, line 7; Pet. p. 7, lines 11-14.

[8]Pet. p. 3, lines 9-26.

[9]Pet. p. 3, line 28, to p. 4, line 6.

[10]Pet. p. 4, line 8.

[11]Pet. p. 4, lines 17-19; Pet. p. 7, lines 11-14.

Pay out of said assets Pioneer's creditors and expenses of this proceeding;[12]

Reinstate Pioneer in possession of the remainder *"to be used in accordance with * * * their by-laws."*[13]

In the petition for stay concurrently filed Pioneer repeats that "all of the *funds claimed by debtor are * * * in the possession of the Historical Society as trustee"* and that the proceeding is "for the preservation of the *assets of the debtor."*

The order to show cause specifies funds *"constituting the assets of the debtor estate * * * now in the possession of * * * Historical Society."*

The order addressed to Historical Society describes it as "trustee of funds *turned over to it as trustee for * * * Pioneer Society";* and the order addressed to The Farmers and Merchants National Bank of Los Angeles describes it as "custodian of the *funds and securities of * * * Pioneer Society which are held by the Historical Society as trustee."*

Each of the typewritten papers just referred to bears the printed card of Morris Lavine, attorney for the petitioner.

---

[12]Pet. p. 4, lines 21 and 22; Pet. p. 7, line 30; Pet. p. 6, lines 22-25.

[13]Pet. p. 4, lines 24-26; Pet. p. 5, lines 2-4; Pet. p. 8, lines 7-13.

Petitioner's Allegations Are in Diametrical Opposition to the Adjudication by the Supreme Court of California and the Admitted Facts.

There is shocking inconsistency between the allegations and implications in the petitions and other papers and the decision of the Supreme Court of California. The diametrical opposition between the petition and the facts admitted at the hearing by Pioneer's counsel is equally striking.

The Supreme Court pointed out that Pioneer's amendment of its by-laws, obtaining the declaratory judgment, the liquidation of assets and dissolution proceedings, were steps in the scheme (thwarted by the Attorney General's intervention) to divert the trust assets from the charitable purpose to the private use of Pioneer's members. It held the by-law amendment abortive (40 Cal. 2d p. 862); the declaratory relief action collusively colorable and the judgment ineffective against the intervenors (40 Cal. 2d p. 857); that a "charitable corporation cannot dissolve and distribute its assets among its members," and that the "members of Pioneer have not at any time had any right to receive the property" (40 Cal. 2d p. 863).

Pioneer's course in the trust betrayal is thus described in the Court's opinion:

> "Pioneer amended its by-laws to close its membership and provide that existing members had a proprietary interest in its assets; it brought a declaratory relief action to obtain a ruling that the assets were not held in trust, paying the attorney fees for both parties thereto;[14] it sold its assets and reduced its

---

[14]The judgment also declared that the assets could be distributed among Pioneer's members [Tr. 7-30-54, p. 23, lines 4-7].

property to cash; it commenced dissolution proceedings; and it maintained in the trial court, in a petition for writs of prohibition and mandate, and on this appeal that its assets are not held for charitable purposes.

*"Pioneer's course of conduct * * * thus demonstrates that it has abused and abandoned its trust and amply supports the determination * * * that a new trustee should be appointed."* (40 Cal. 2d pp. 856, 861-862.)

With reference to revocation (after judgment) of the dissolution resolution, the Supreme Court held that it had no effect on the proceeding by the Attorney General (40 Cal. 2d p. 864).

Pioneer's Counsel at the Hearing Before Judge Mathes on July 28 and 30, 1954, Admitted That Vital Allegations of the Petition Are False.

The transcript of this hearing covers more than 100 pages of typewritten matter.

The obligations, payment of which out of trust funds is sought, were thus stated by Mr. Lavine:

Lavine's fees and expenses	$13,000.00
Accountants' fees	380.00
Bond	13.50
Photostats	10.50
Flowers	6.21
Stamps	3.50
	$13,413.71[15]

[15]Tr. 7-28-54, p. 3, lines 17-21; p. 4, line 23; p. 6, line 6.

It was admitted, also, that the Superior Court had been asked for, and had refused, permission to pay these bills out of the trust fund.[16]

With specific reference to the allegations of the petition, Mr. Lavine admitted:

(a) The only title Pioneer ever had or could claim to the assets which the petition asks the court to take over was as trustee;[17]

(b) Historical was appointed by the judgment successor to Pioneer as trustee, and has taken over the impounded trust funds; the judgment was affirmed, and has long since become final;[18]

(c) The judgment placed title to all of Pioneer's assets in Historical as trustee for the charitable purposes stated in Pioneer's articles; Historical is *not* trustee for Pioneer;[19]

(d) As between Historical and Pioneer the former has final adjudication of title in its favor;[20]

(e) "The Court—* * * the Superior Court, back in 1950, put * * * title to all the assets of Pioneer * * * in the successor trustee, Historical.

Mr. Lavine—That is right.

The Court—That judgment * * * has long since become final, has it not?

Mr. Lavine—That is correct, your Honor.

---

[16]Tr. 7-28-54, p. 5, line 21, to p. 6, line 5.

[17]Tr. 7-28-54, p. 18, lines 2-20; Tr. 7-28-54, p. 23, lines 3-23; Tr. 7-30-54, p. 40, line 21.

[18]Tr. 7-28-54; p. 22, line 13.

[19]Tr. 7-30-54, p. 36, line 9; Tr. 7-30-54, p. 40, line 12.

[20]Tr. 7-28-54, p. 23, line 9.

The Court—What else is there to talk about? How could this court possibly, except in utter defiance of the State law, hold that this debtor has any possible claim to these assets, title to which has been placed in Historical by a judgment of the State Court, affirmed by the highest court of the State and review denied by the Supreme Court of the United States, long since final? How could this court under any conceivable theory disturb that title?

Mr. Lavine—Its only title (is) as trustee and—

The Court—*That's the only title that Pioneer ever had or could possibly claim.*

Mr. Lavine—*That is right;* but certainly *had a right to re-petition for its return.*

The Court—*No mention of that is made in this petition * * * no mention * * * of the judgment of the State Court. This court was not informed of the Pioneer case or of its appeal * * *.*"[21]

"The Court—On page 6, lines 1-4, the petition alleges,

'The debtor proposes to obtain the money, which is in excess of $95,000 from stocks and bonds which the Historical Society has bought as trustee for Los Angeles County Pioneer Society and which will be turned over to the trustee to be appointed by this Court.'

Mr. Lavine—That omitted * * * 'for the purposes set forth in the articles of the Los Angeles County Pioneer Society.' "[22]

In face of the final adjudication and these admissions, the proposal that the Bankruptcy Court not only authorize

---

[21]Tr. 7-30-54, p. 40, line 12, to p. 41, line 14.

[22]Tr. 7-30-54, p. 35, line 25, to p. 36, line 15.

payment out of the trust fund of expenses incurred by Pioneer in its attempt to defeat and betray the trust but reinstate Pioneer in possession of the balance of the fund with express authorization to use the same in accordance with the judically condemned by-laws, adds insult to injury.

Assets of the Charitable Trust Are Not Includable in the Bankruptcy Proceeding; and Accounting or Other Proceedings Incidental to Administration of the Trust Cannot Be Stayed by the Bankruptcy Court.

Admittedly the property in Historical's possession belongs to the public charitable trust, and had been taken away from Pioneer and turned over to Historical because the former had been tried and found faithless as fiduciary.

It is settled that property held by a debtor as fiduciary cannot be included in a bankrupt's estate, and that legal proceedings incident to the administration of the trust may not be stayed by the bankruptcy court.

Remington on Bankruptcy, Sec. 1212;

In re Commonwealth Bond Corporation; Evans v. Mann (C. C. A. 2, 1935), 77 F. 2d 308, 309-310;

In re Prudence Bonds Corporation (C. C. A. 2, 1935), 79 F. 2d 212;

Guarantee Bond & Mortgage Co. v. Hilding (C. C. A. 6, 1923), 290 Fed. 22, 29.

Of necessity, accounting by Pioneer is purely incidental to the administration of the public trust and pursuant to a final judgment of the State Court. Obviously, Pioneer has evinced and continues to exhibit strong disinclination to make the accounting.

The Orders Were Signed Under Gross Misapprehension, Were Properly Vacated When the Truth Was Disclosed, and No Reason for Their Reinstatement Is Suggested.

Obviously, had petitioner disclosed the decision of the State Court, or had he stated to Judge Harrison the truth as later admitted before Judge Mathes, the stay and restraining orders would never have been signed.

Pioneer's flagrant sins of omission and commission were not disclosed until the hearing before Judge Mathes.

Under its general equity powers, and to protect the public and its own jurisdiction against abuse, the court not only had ample authority but was in duty bound to terminate interference with the carrying out of the judgment of the State Court in a matter peculiarly within the latter's jurisdiction in the administration of a public charitable trust.

> *Securities Com'n v. U. S. Realty Co.* (1940), 310 U. S. 434, 456-458.

As said by the Circuit Court of Appeals for the Eighth Circuit, when an application for judicial action is presented,

> "the District Judge * * * is not a ministerial, but a judicial, officer, whose first duty is to see that those who minister in the temple of justice shall not invoke his authority for the accomplishment of fraud."
>
> *Zeitinger v. Hargadine-M'Kittrick Dry Goods Co.* (C. C. A. 8, 1917), 244 Fed. 719, 723.

> "* * * the court is the protector of the purity of its own process, and may take such steps as are necessary to protect against its abuse, on its own motion, or upon the suggestion of a stranger; and neither state statutes nor ordinary procedural rules can thwart a prompt and efficacious discharge of that paramount obligation." (Citing numerous authorities.)
>
> *Pueblo de Taos v. Archuleta* (C. C. A. 10, 1933), 64 F. 2d 807, 812.

When the facts were disclosed at the hearing, Judge Mathes put an end to the obvious and admitted imposition which had been perpetrated upon both the District and the State Courts.

Nothing has since occurred to mitigate the conditions then disclosed.

Pioneer Cannot Be Dissolved Until It Complies With the Judgment and All Litigation Is Disposed of.

Petitioner's statement that the Superior Court intends to dissolve Pioneer before any of the things required by the judgment are done carries its own refutation.

Under the judgment Pioneer must first make the accounting; it must then close up its business and report to the court; after approval of the report, and then only, can dissolution take place.

The judgment, common sense and judicial comity alike preclude dissolution until not only all these things are accomplished, but this proceeding and all other litigation in which Pioneer is involved are concluded.

Conclusion.

The form and contents of the petition and petitioner's conduct demonstrate complete absence of the "clean hands" always essential on the part of everyone who seeks the aid of any court and especially of a court of equity.

Respectfully submitted,

LAWLER, FELIX & HALL,

OSCAR LAWLER,

Attorneys for Historical Society of Southern California.